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≡ Navigation



DISCUSSION RESPONSE

Redressing Colonial Wrongs?

MIEKE VAN DER LINDEN — 19 October, 2015



A response to Maximilian Pichl

On 12 May 1883, the Germans set foot ashore on the coast of South-West Africa – now known as Namibia. The settlement of Germans on natives' lands immediately became a fact. The native peoples inhabiting the area, the Herero and the Nama, resisted to the German presence on and expropriation of their lands. As a reaction, the Germans launched a war of extermination during the first decade of the 20th century. Next to the violent clashes between the native peoples and the Germans, the Germans established concentration camps in which prisoners were exploited and starved to death. Nowadays, the term Holocaust is used to denote these years

in which almost 80% of the Herero people – approximately 70.000 individuals – lost their life due to German policy and acts. An enormous amount of literature appeared on the two questions whether, first, these facts in history can be interpreted as Germans committed genocide and, second, Germany can be held responsible for what happened back then. The question on reparations for such historical wrongs is a returning subject of debate in international law, which has no proper answer (yet). Although these are wrongs that reach far back into history, they have a continuous impact on the present. Most former colonies remain severely disadvantaged in the current world order. In other words, the question of reparations is about addressing current global inequalities; the effects of the past persist and directly affect the present.

The establishment of legal responsibility for the historical wrong of colonization is not without difficulties. The road to a clear and direct answer to the question whether responsibility can be established and whether there are remedies available in current national, regional and international law to redress past colonial wrongful actions is not straightforward. The lapse of time and the remoteness of the wrongful acts make it hard to fulfil the conditions to hold someone responsible for what happened in the past. The two main complications, with which the international lawyer is confronted in establishing responsibility for the colonization of Africa as a breach of law, are the so-called non-identity problem and the situation of supersession of legal norms.

Non-identifiable parties

The first difficulty regards the identification of both the injured party and the responsible party. Who can invoke responsibility from whom for the illegality of the colonization of Africa in the context of international law? First, the injured party has to be determined. The former European colonizing powers interfered with the sovereign and private rights of African nations. In this respect, the affected party by the international wrongful act, thus, consisted of the native rulers, the African political entity as a whole and the members of the polity. Because many of these African polities do not longer exist or changed and the individuals involved have passed away, questions arise regarding the legitimate representation of former injured entities. This indeterminateness of the injured party makes it (too) hard to establish a responsibility for colonization as a wrongful act. The core problem cannot be solved; the question stays whether current entities – whether nations, States or other groups of people – can be identified as legitimate representatives of the African rulers and peoples at the end of the 19th century who suffered from the European colonization.

Further, the identification of a current African State with historically injured rulers and peoples is rejected on the basis of the argument that the injured party was and is considered to be a non-State actor, as the International Court of Justice implicitly pronounced in the *Cameroons v. Nigeria* case (2002). In this case, the Court stated that the African entities with which the European powers concluded treaties could not be considered as States. This observation implies the impossibility of a current African State to be the legitimate successor of the injured African treaty party of the era of imperialism. A current State cannot be considered as a substitute of a non-State back then. As a result, present

States cannot be considered the successors to the rulers with whom the Europeans dealt with.

In addition, the lapse of time makes the non-identification problem even more complex. The long time period passed between the commitment of the wrongful acts and present-day reality causes the difficulty and even impossibility to identify legitimate successors of a native ruler and people injured by the European colonization, who could hold former colonial States responsible. Being a legitimate claimant is highly dependent of the time period gone by and the changes to which the world has been subjected in the meanwhile. The common assumption is that the existence and identity of people living in the future depend on the decisions and actions of presently living people. The general opinion of legal scholars is that the assumption of continuous and undisruptive chain of generations is likely to be the exception rather than the rule and faces difficulties in proving it. This is especially the case if the wrongful act does not continue any longer and has its end in the past, which implies that succeeding generations can only claim to be indirectly injured.

Alongside the indeterminateness of the injured party, the identification of the responsible party is also problematic and controversial. How can present day (groups of) individuals or States be held responsible for the past wrongs of others, in particular when these current (groups of) individuals or States have not been individually or directly responsible for committing the wrong? Identification of a current generation with a remote generation of injured and responsible parties limits the possibilities to establish responsibility for Africa's colonization, when taking into account that much has happened and changed in the

intermediate period of 150 years. Determination of those injured and responsible turns out to be (too) complicated. But does this indeterminateness also counts for the rights and obligations involved? Is passed time indeed insurmountable?

Supersession

Since the European colonial powers violated international law and disrespected the rights of African natives, the involved people and conditions have changed radically. And, as a consequence, past titles and rights expired and new were created. Not only the involved parties changed, but also their rights and obligations. The rule of restitution is a fundamental rule and that it applies in the sense that one has to return that what he has taken illegally. There are, however, certain time limits to which the claim for restitution is bound. In this light, the supersession thesis comes in, which states that the illegal nature of acts in the past cannot and should not be addressed after a certain period of time has gone by.

This thesis must be taken seriously and can indeed have the effect that claims issued by consequence of an illegal act lose their validity on the basis of the changed circumstances. Property rights and their meaning, for example, are highly dependent of the surroundings in which they have to function. Through the course of time, the taken land has been subject to transfers and has been held in property by many. It would be wrong to let a current owner, who acquired and possesses his property in good faith, pay for illegal acts of more than a century ago. Taken all aspects into consideration it seems to be reasonable that restitution for historic acts of dispossession should not be effectuated if

this would interfere with property rights of current land owners. Wrongs should not be made up with wrongs. On balance, the principle of legal security requires that the supersession thesis applies. Rights and obligations have a contingent nature which necessarily limits the possibility to exercise them. It seems paradoxical, but it is not, to argue that supersession of rights and obligations is essential for people's legal certainty. This makes prescription a fundamental mode of acquisition in both private law and public law, on the national and international level.

Note, however, that the supersession thesis should not be applied in general, but should be considered from a case-by-case approach. Put differently, while the supersession thesis cannot be circumvented on the international level, this does not mean that colonial wrongs cannot be redressed on the national level. In the case of the extermination of the Herero people in South-West Africa, for example, Germany was confronted with the claim to take responsibility for its colonial past and its postcolonial repercussions. This was not (just) because of the centenary of the German-Herero war but a reparations claim against the German government, Deutsche Bank and Woermann Line – both private parties were involved in doing business in South-West Africa at the time of colonization – was issued by the Herero People's Reparation Corporation in 2001. Although this claim remained without success, the case is not closed and further ways to hold Germany responsible are explored.

As a consequence of the supersession of people and their rights and obligations, legal responsibility for the historical wrong of Africa's colonization by European States, as a unified and general event, cannot be established. Though, this does not mean that, in particular cases and

circumstances, responsibility of former colonial powers can be claimed successfully. The indeterminateness of involved parties and rights and obligations are insurmountable and make the dealing with a claim for responsibility impossible. The offering of apologies, as a remedy to redress historical wrongs, is, therefore, excluded. International law does recognize apology as a formal remedy for violations of international law. Despite this recognition, its application forms the exception in the political arena; statements by State officials are rarely brought in public. As said, no responsibility, no apologies to remedy.

The road to a clear and direct answer to the question whether responsibility can be established and whether there are remedies available in current national, regional and international law to redress past colonial wrongful actions is not straightforward. The lapse of time and the remoteness of the wrongful acts make it hard to fulfil the conditions to hold someone responsible for what happened in the past. The establishment of responsibility for the illegality of Africa's colonization is confronted with two difficulties: the identification of the injured and responsible parties and the supersession of rights and obligations. In this light, the passage of time turned out to be invincible; it is too complex to establish responsibility, in general, for this wrong in the past. The establishment of such a responsibility would affect legal security, create injustice and violate the law itself. This part concluded with determining that the establishment of responsibility is impossible, that the applicability of remedies is excluded and, thus, that apologies do not have to be offered either. And, if obligations are superseded, no remedies – which include apologies – have to be provided.

Does the narrative end with arguing that the colonization of Africa was illegal without any remedy to redress this historical wrong on the international level? No. The road to give Africa's colonization a place in the history of international law does not stop here. There is an alternative route which passes the establishment of responsibility and the claim for reparations, namely, the recognition of the illegal nature of the colonization of Africa. Until recently, the determining impact of the acquisition and partition of this continent by European colonial powers on the nature, creation and development of international law is not acknowledged by its agents. This is unfortunate, because it has underlined the civilization or the cultural difference argument as justification and basis of international law. In the context of the colonization of Africa, this dual world view underlying the further development of international law should be recognized. This encourages the agents of international law to interpret international law in its historical context and enables them to reflect on and abandon the biased nature of international law. What happened in the past cannot be undone, but legacies of this past can.

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ISSN 2510-2567

Tags: Africa, Colonialism, Genocide, Herero, Just Satisfaction, Postcolonialism, Reparations



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